(2)

No. 87-2055

In The
Supreme Court of the United States
October Term, 1987

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Petitioners,

v.

ANNE FUCHILLA,

Respondent.

On Petition for Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION OF RESPONDENT ANNE FUCHILLA

MATTHIAS D. DILEO, ESQ.
Counsel of Record

MAUREEN S. BINETTI, ESQ.
On the Brief

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07096
(201) 636-8000
Counsel for Respondent Anne Fuchilla

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS:

TABLE OF AUTHORITIES—Continued

No. 87-2055

In The

Supreme Court of the United States

October Term, 1987

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Petitioners,

v.

ANNE FUCHILLA,

Respondent.

On Petition for Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION OF RESPONDENT ANNE FUCHILLA

Respondent, Anne Fuchilla, herewith submits her brief in opposition to the Petition for a Writ of Certiorari filed herein by the University of Medicine and Dentistry of New Jersey and The Board of Trustees of the University of Medicine and Dentistry of New Jersey. The petition seeks review of *Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988), a decision of the Supreme Court of New Jersey, decided February 8, 1988.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of the decision of the New Jersey Supreme Court in *Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988) (Pet. Ap. 1a-81a),[1] in which the Court held: (1) that the notice provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, specifically, N.J.S.A. 59:8-8, 9, do not apply to Section 1983 actions brought in state courts, on the ground that the Supremacy Clause, U.S. Const., Article VI, precludes the application of state procedural requirements which thwart the purposes of federal legislation; and (2) that the University is a "person" within the meaning of 42 U.S.C. § 1983 and therefore, may be liable for civil rights violations under that statute.[2]

The New Jersey Supreme Court thereby affirmed the decision of the Appellate Division of the Superior Court of New Jersey, 210 N.J. Super. 574, 510 A.2d 281 (App. Div. 1986) (Pet. Ap. 82a-103a), and rectified the trial court's error in dismissing Respondent's complaint for failure to comply with the notice provisions of the Tort Claims Act in connection with her suit, *inter alia*, for violations of Section 1983.

That the New Jersey Supreme Court's decision on the notice issue was correct, and in accordance with federal

---

1 References to Respondent's appendix appended to this brief are referred to as "Res. Ap.". References to the appendix attached to the Petition are referred to as "Pet. Ap."

2 The New Jersey Supreme Court also held that the notice provisions of the New Jersey Tort Claims Act do not apply to claims brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* Petitioners do not seek review of that portion of the Court's decision.

law, is clear, particularly since this Court recently reversed another state Supreme Court, the Wisconsin Supreme Court, which had held that a notice requirement is a permissible condition to institution of a Section 1983 action in state court. In *Felder v. Casey*, — U.S. —, 56 U.S.L.W. 4689 (1988), *rev'g* 139 Wis.2d 614, 408 N.W.2d 19 (1987), this Court held that such a notice provision violates the Supremacy Clause and improperly limits a plaintiff's federal rights under Section 1983. This Court's *Felder* decision (decided subsequent to the filing of the within petition, in which petitioner relied on the reversed decision of the Wisconsin Supreme Court), not only removes any federal question as to the notice issue, but, it is respectfully submitted, essentially renders moot this basis for the petition.

The holding of the New Jersey Supreme Court that Petitioner the University of Medicine and Dentistry of New Jersey ("UMDNJ") is a "person" under Section 1983, similarly, is equally supported by federal law and equally contrary to Petitioners' vain attempts to have this issue decided in the manner they deem appropriate. In presenting this issue for the first time in a footnote to their brief in the Appellate Division, Petitioners sought to convince that court of the propriety of their position on this issue in a case in which it had not been factually developed or indeed, raised at all. After an adverse decision by the Appellate Division on this question, *Fuchilla, supra*, 210 N.J. Super. at 581-84, 510 A.2d at 284-85 (Pet. Ap. 93a-96a), Petitioners sought, and were granted, certification to the New Jersey Supreme Court on this newly-raised issue. That Court specifically was urged by Petitioners "not to remand the matter but to resolve that

issue," *Fuchilla, supra,* 109 N.J. at 325, 537 A.2d at 655 (Pet. Ap. 14a), and the record was supplemented by Petitioners at that juncture for the very purpose of ensuring that the Court would decide it, based upon the particular factual circumstances applicable to Petitioners. *Id.* Once again, however, Petitioners were disappointed in the result.

Petitioners now seek this Court's review of the New Jersey Supreme Court's well-reasoned determination, made in accordance with federal standards applicable to the facts surrounding UMDNJ's relationship with the State of New Jersey, that UMDNJ is a "person" under Section 1983. *Fuchilla, supra,* 109 N.J. at 323-30, 537 A.2d at 654-57 (Pet. Ap. 8a-29a). Petitioners criticize what they claim is a "cursory and flawed analysis" by the New Jersey Supreme Court of the factors applicable to such a determination—an analysis utilizing the facts supplied by Petitioners—and request that this Court establish "uniform federal criteria" for determining whether a public university is immune from suit under Section 1983. Petitioners barely conceal their true request—that this Court determine that *all* such universities are *immune* from suit. Petitioners ignore well-established case law which mandates that such a determination be made on a case-by-case basis, through an application of the criteria for such determinations to the facts and circumstances of each university's relationship with its state of residence.

As argued herein, Petitioners' contention that this Court should intervene in this case to establish "uniform federal criteria" for such determinations is not only unwarranted, but would be contrary to existing, consistent federal law on this issue.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE OF THE ASSERTED NEED FOR "UNIFORM FEDERAL CRITERIA" AS TO WHETHER PUBLIC UNIVERSITIES ARE "PERSONS" UNDER 42 U.S.C. § 1983. NO FEDERAL QUESTION EXISTS REQUIRING REVIEW BY THIS COURT, AS SUCH FEDERAL CRITERIA ALREADY EXIST AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

For liability to attach under 42 U.S.C. § 1983, the defendant must be a "person" within the meaning of that section. This Court has, at minimum, implied that a state cannot be a "person" for § 1983 purposes, *see Quern v. Jordan*, 440 U.S. 332, 350 (1979) (Brennan, J., concurring), but has held that municipalities may be considered "persons." *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This reasoning is related to the analysis performed to determine immunity from federal suit under the Eleventh Amendment, a matter of federal law. *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court discussed the types of factors useful in determining whether an agency is the alter-ego or "arm of the state," and therefore immune from suit. These factors are: (1) how the agency is characterized by the language of the creating statutes; (2) whether the agency derives its funding from local or state government; (3) whether the state is financially responsible for liabilities and obligations incurred by the agency; (4) whether the members or officers of the agency are appointed by the state, or county or local, governments;

(5) whether the function performed by the agency is more traditionally associated with state, or with county or local, government; and (6) whether the agency's actions are subject to veto by the state government. *Id.* at 401-02.

None of these factors is in itself conclusive; however, the Court in *Lake Country*, as well as in numerous other decisions, has indicated that the primary reason for permitting state agencies to invoke Eleventh Amendment immunity is "to protect the state treasury from liability that would have . . . essentially the same practical consequences as a judgment against the State itself." *Lake Country, supra*, 440 U.S. at 401, *citing Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). *See also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984).

The Court of Appeals for the Third Circuit has developed criteria co-extensive with the analysis performed in *Lake Country*. In *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), the Third Circuit explained this nine-factor analysis, which, like this Court's decisions, contains no single conclusive factor, but gives substantial weight to the financial relationship between the agency and the state. *See id.* at 251. *See also Blake v. Kline, supra*, 612 F.2d at 723.

The nine *Urbano* criteria are: (1) local law and decisions concerning the relationship between the agency and the state; (2) whether a judgment would have to be paid from the state treasury; (3) whether the agency has the funds or power to satisfy such a judgment; (4) whether the agency is performing a "governmental or proprietary" function; (5) whether the agency has been separately incorporated; (6) the degree of autonomy the agency main-

tains over its operations; (7) whether the agency has the power to make contracts and to sue and be sued; (8) whether the agency's property is immune from taxation; and (9) whether the state has immunized itself from responsibility for the agency's operations. *Urbano, supra,* 415 F.2d at 250-51. The second and third factors—the source of payment of a judgment against the agency—are recognized as "perhaps the most important" of these, but no one factor "is conclusive". *Id.*

A thorough analysis of the *Urbano* test, as further explained in *Blake* (both ignored by the within petition), reveals that the Third Circuit approach is merely a more detailed characterization of the factors employed by this Court in *Lake Country* and similar decisions. *See, e.g., Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey,* 819 F.2d 413, 414-17 (3d Cir.), *cert. denied,* 108 S.Ct. 344 (1987) (discussing *Urbano* as complementary to *Lake Country*).[3]

Petitioners, argue, however, that uniform federal criteria do not exist for determining whether an entity is a "person" under § 1983 or whether it is immune from suit as the alter ego of the state. Moreover, Petitioners assert that the New Jersey Supreme Court's decision in the case at bar "paid scant, if any, attention to the issue of whether the State of New Jersey is the real party in interest in this case." (Pet. at 22, *citing Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101 (1984)). This statement, quite simply, is inaccurate. Petitioners ignore

---

[3] Indeed, the *Urbano* factors have been applied in several circuits other than the Third Circuit. *See Ainsworth Aristocrat Int'l Pty. v. Tourism Co. of Puerto Rico,* 818 F.2d 1034, 1037 (1st Cir. 1987); *Hall v. Medical Coll. of Ohio at Toledo,* 742 F.2d 299 (6th Cir. 1984), *cert. denied,* 469 U.S. 1113 (1985).

the fact that the well-reasoned decision of the New Jersey Supreme Court not only took into consideration all facts Petitioners placed before it, but had the benefit of a prior, detailed factual analysis of the New Jersey District Court resolving this very issue as to UMDNJ in the same manner. *See Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey, et al.*, Civ. Action No. 85-3841 (unpublished opinion) (D. N.J. 1986) (*See* excerpts, Res. Ap.).[4]

Moreover, Petitioners' repeated references to *Pennhurst*, and particularly to the phrase "whether the State is the real party in interest," cloud rather than clarify the issue. *Pennhurst* addressed the question whether state officials could be sued in that capacity. It did not discuss, let alone establish, a standard for whether and when an *agency* might be an alter ego of the state. *Pennhurst, supra*, 465 U.S. at 101. Petitioners' reliance on *Pennhurst* with respect to the issue of an agency's immunity, therefore, is misplaced. Since that case merely considered the issue of immunity for state officials, not for state or local agencies, it would have been pointless for the *Pennhurst* Court to engage in a discussion of the relationship between states and state agencies. It is thus misleading to rely on *Pennhurst's* much simpler analysis in evaluating the more complex agency situation. This reliance is all the more disingenuous in light of the fact that Petitioners have

---

[4] Moreover, the Third Circuit has implicitly found that UMDNJ is a "person" under Section 1983 by its discussion of the merits of a case against UMDNJ after trial (and after the District Court had found no sovereign immunity), where, as a jurisdictional defense, the issue would have been explored by the Circuit Court prior to any discussion on the merits. *See Mauriello v. University of Medicine and Dentistry*, 781 F.2d 46 (3d Cir.), *cert. denied*, 107 S.Ct. 80 (1986).

ignored the more detailed *Urbano* and *Blake* analysis appropriate to the state/state agency relationship— an analysis which the New Jersey Supreme Court diligently followed.

Thus, Petitioners' characterization of the emphasis in the New Jersey Supreme Court's decision on the financial relationship between the University and the State as a "fundamental flaw" (Pet. at 23) ignores both the existence, and the New Jersey Supreme Court's application, of these more appropriate federal guidelines. Petitioners' characterization also fails to consider this Court's standard for identifying the "real party in interest": "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest. . . ." *Ford Motor Co., supra,* 323 U.S. at 464 [citations omitted]. The New Jersey Supreme Court's emphasis on the financial relationship between UMDNJ and the State of New Jersey is thus not a "fundamental flaw," but rather the fundamental underpinning of the "real party in interest" analysis. The New Jersey Supreme Court correctly determined, from the appropriations handbook provided it by Petitioners, that UMDNJ has ample private funding to ensure that the State would not be required to pay a judgment rendered against UMDNJ; rather, it could satisfy any such judgment with funds from private sources *Fuchilla v. Layman, supra,* 109 N.J. at 327-28, 537 A.2d at 656 (Pet. Ap. 20a-23a). This Court's "real party in interest" test thus was met.

Furthermore, the New Jersey Supreme Court not only recognized, but conscientiously applied, the other criteria utilized by this Court, and the *Urbano* analysis, to properly weigh all relevant factors. It recognized not only

that some of the *Urbano* factors, such as those concerning the financial relationship between the University and the State, are to be weighed more heavily than others, but also that no single factor was intended to be conclusive. *See Urbano, supra,* 415 F.2d at 251. For this reason, the New Jersey Supreme Court explicitly stated that some of the factors did not strongly favor a finding either of immunity or of lack of immunity. However, based upon UMDNJ's enabling statute (Pet. Ap. D), and the appropriations handbook supplied to the Court by Petitioners, the Court properly found that "[o]n balance, . . . the *Urbano* factors tip in favor of finding that UMDNJ is not the alter ego of the State for eleventh amendment purposes and therefore, is liable as a 'person' under Section 1983." *Fuchilla, supra,* 109 N.J. at 330, 537 A.2d at 657 (Pet. Ap. 29a). Thus, it is clear that the Court's analysis was correctly reasoned, in accordance with the Third Circuit's *Urbano* and *Blake* analysis, this Court's decisions, and the New Jersey Supreme Court's factual analysis of the relationship between a New Jersey university and the State of New Jersey.

Despite the correctness of the Court's decision, and the appropriateness of a state Supreme Court deciding the status of a university within its borders, in accordance with established case-by-case factual criteria, Petitioners seek "uniform federal criteria" for determining whether a university may be sued under § 1983. As has been discussed *supra,* such uniform criteria already exist and were properly applied in the present case by the New Jersey Supreme Court. A review of the petition makes clear, however, that Petitioners' request in reality is for a uniform *rule* under which public institutions of higher educa-

tion are *always* immune from suit, regardless of the nature of the relationship between a particular state and a particular university. The petition predicts that the use of "the type of mechanistic analysis followed by the court below would preclude almost all public institutions of higher education from claiming the protection of the Eleventh Amendment" (Pet. at 23-24). Presumably, in Petitioners' view, such dire consequences may only be avoided by a ruling from this Court prohibiting such "mechanistic" analyses as that employed by the New Jersey Supreme Court, and substituting a "mechanistic" rule granting immunity in all cases involving such universities.

This reasoning, thinly veiled in Petitioners' argument, is inadequate for several reasons. First, this Court has held that the Eleventh Amendment does not prescribe an absolute rule granting sovereign immunity to all agencies that exercise a "slice of state power." *Lake Country, supra,* 440 U.S. at 401, *citing Mount Healthy Board of Ed. v. Doyle,* 429 U.S. 274 (1977). The *Lake Country* Court, after applying what Petitioners might characterize as a "mechanistic analysis" quite similar to that of the New Jersey court in the present case, found that a bi-state planning agency was not immune from suit, notwithstanding that it was a creation of the states in which it operated. *Lake Country, supra,* 440 U.S. at 400-02. In fact, this Court, in declining to approve the blanket immunity rule utilized by the Court of Appeals in the *Lake Country* case, recognized instead the need for a case-by-case analysis, as was exercised by the New Jersey Supreme Court in the present case. *Id.*

Second, Petitioners' plea for a uniform rule is disfavored by many of the cases cited in their petition. For

example, Petitioners rely frequently and at length on the Seventh Circuit's decision in *Kashani v. Purdue University,* 813 F.2d 843 (7th Cir.), *cert. denied,* 108 S.Ct. 141 (1987), in which the Seventh Circuit held that Purdue University was the alter ego of the State of Indiana (Pet. at 26-27). The Seventh Circuit emphasized, however, that "courts reexamine the issue with regard to the facts of each case 'because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning.'" *Kashani, supra,* 813 F.2d at 845, *quoting United Carolina Bank v. Board of Regents,* 665 F.2d 553, 557 (5th Cir. 1982). In fact, the *Kashani* court performed an analysis very similar to that performed by the New Jersey Supreme Court in the present case. *See Kashani, supra,* 813 F.2d at 845-47. The very fact that the *Kashani* court reached a different conclusion, based upon the *facts* before it, reaffirms the validity of the Court's analysis here. The New Jersey Supreme Court merely applied the same analysis to a different set of facts. *See Kashani, supra,* 813 F.2d at 845-48; *Fuchilla, supra,* 109 N.J. at 325-30, 537 A.2d at 655-57. Indeed, the need for a case-by-case analysis has been emphasized repeatedly. *See, e.g., Hall v. Medical College of Ohio, supra,* 742 F.2d at 302, *quoting Soni v. Board of Trustees,* 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976) ("[e]ach state university exists in a unique governmental context, and each must be judged on the basis of its particular circumstances").

Finally, the adoption of a rigid rule with respect to all university/state relationships would have the anomalous effect of requiring the states to ensure that their own universities are organized in accordance with what-

ever rule is established. As has been noted *supra*, each state's relationship with its public universities is its own, following no precise outline; hence the need for case-by-case analysis. *See Kashani, supra*, 813 F.2d at 845; *United Carolina Bank, supra*, 665 F.2d at 557; *Hall v. Medical College of Ohio, supra*, 742 F.2d at 302. The inevitable result of a rule dictating the manner in which all states' relationships with their universities are to be interpreted will be changes in many of those relationships, as the states seek to ensure that their universities comply with the new rule. The outcome, then, would be an unnecessary and unwarranted intrusion by the federal judiciary upon the right of individual states to conduct their statewide educational systems as they see fit. Neither the decision of the New Jersey Supreme Court here, nor the state of the existing law on this issue, warrants this Court's intervention to achieve such a dangerous result.

For the foregoing reasons, Respondent respectfully submits that this Court should deny certiorari on this issue.

II. CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL QUESTION IS PRESENTED BY THE NEW JERSEY SUPREME COURT'S HOLDING, CONSISTENT WITH THIS COURT'S RECENT DECISION, THAT THE NOTICE PROVISIONS OF THE NEW JERSEY TORT CLAIMS ACT MAY NOT BE APPLIED TO SECTION 1983 ACTIONS.

The New Jersey Supreme Court held in the present case that the notice provisions of the New Jersey Tort Claims Act are inapplicable to actions brought in state court pursuant to Section 1983 because such state legisla-

tion thwarts a federal right, in violation of the Supremacy Clause. *Fuchilla, supra*, 109 N.J. at 330-32, 537 A.2d at 657-59 (Pet. Ap. 29a-35a). The Court's reasoning was essentially identical to that recently employed by this Court in *Felder v. Casey*, — U.S. —, 56 U.S.L.W. 4689 (1988), *rev'g*, 139 Wis.2d 614, 408 N.W.2d 19 (1987). Petitioners had relied on the now-reversed decision of the Wisconsin Supreme Court—which held that such a notice provision was proper—in support of their petition on this issue. With this Court's judgment so recently enunciated, it is respectfully submitted that no legitimate federal question exists as to this issue; indeed, it is moot. Therefore, Respondent respectfully requests that certiorari be denied on this basis.

———o———

CONCLUSION

For the foregoing reasons, the Petition of the University of Medicine and Dentistry of New Jersey and The Board of Trustees of the University of Medicine and Dentistry of New Jersey should be denied.

Respectfully submitted,

MATTHIAS D. DILEO, ESQ.
Counsel of Record

MAUREEN S. BINETTI, ESQ.
On the Brief

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07096
(201) 636-8000
Counsel for Respondent
Anne Fuchilla

July 14, 1988

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARGO P. COHEN, Plaintiff vs. BOARD OF TRUSTEES OF THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY; STANLEY BERGEN, President of University of Medicine and Dentistry of New Jersey; VINCENT LANZONI, as Dean, New Jersey Medical School, and individually; and CARROLL M. LEEVY, as Chairman, Department of Medicine, New Jersey Medical School, and individually, Defendants	)	Civil Action No. 85-3841 OPINION

(Filed June 27, 1986)

BARRY, District Judge

I. Introduction

Plaintiff, Dr. Margo P. Cohen, held an appointment as an untenured tenure-track professor at the New Jersey Medical School of the University of Medicine & Dentistry

of New Jersey (hereinafter "NJMS" and "UMDNJ" respectively). The defendants are the Trustees of UMDNJ, Stanley Bergen, President of UMDNJ; Vincent Lanzoni, Dean of NJMS, and Carroll M. Leevy, Chairman of the Department of Medicine of NJMS. NJMS is one of several component parts of UMDNJ, which was founded by Statute. N.J.S. 18A:64G-1 *et seq.* (as amended 1981). Pursuant to N.J.S. 18A:64G-6(q), UMDNJ has adopted bylaws for its governance (hereinafter "UMDNJ Blylaws"). In accord with UMDNJ Bylaw Art. 1, §2, ¶ 2.1, NJMS has drafted bylaws for its direction (hereinafter "NJMS Bylaws"). Following NJMS Bylaw Art. II, Tit. C, § 1, ¶ 1.3, NJMS has promulgated a set of guidelines for the appointment and promotion of its faculty (hereinafter "Guidelines").

Plaintiff's present dilemma began when, after a positive indication, confirmed by letter, that she would receive the recommendation of her department in the tenure process, plaintiff's department refused to recommend her for tenure, which she was subsequently denied. Plaintiff then, on August 1, 1985, filed a three-count complaint, alleging violations of her constitutional rights under 42 U.S.C. §§ 1983, 1985, 1986, and 1988. On October 9, 1985 plaintiff filed an eight-count amended complaint alleging the same federal constitutional violations (Counts 1-3), common law breach of contract (Count 4), common law misrepresentation (Counts 5 & 6), wrongful interference with economic relations (Count 7), and equitable estoppel (Count 8).

Defendants filed a summary judgment motion, requesting that they be relieved of all legal liability on plaintiff's complaint. However, defendants have only addressed the federal courts in their papers and have advised the

court that the state law claims will be the subject of a subsequent summary judgment motion. I shall, therefore, treat their motion as one for partial summary judgment pursuant to Fed.R.Civ. P. 56(d). Plaintiff has cross-moved for partial summary judgment as to liability on the 42 U.S.C. § 1983 claim and, in the alternative, requests a preliminary injunction, continuing her employment at NJMS until the termination of this suit. Before summary judgment may be granted, there must be no genuine issue of material fact and the movant must be entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Link v. Mercedes-Benz, Inc.*, 85-1552 & 85-1651 (3d Cir. 16 April, 1986); *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103 (3d Cir. 1985); *Reilly v. Firestone Tire & Rubber Co.*, 764 F.2d 167 (3d Cir. 1985).

Plaintiff, a wife and mother of three children, has been leading an extremely active professional life in academic medicine. She is widely recognized as a leader in her field, endocrinology, and has numerous awards and publications to her credit. In 1971, plaintiff became a member of the faculty of the Medical School at Wayne State University in Detroit, achieving tenure in 1977 and full professor status in 1978.

In 1982, through defendant Leevy, plaintiff was hired by UMDNJ as a full professor, but without tenure, and as Director of the Division of Endocrinology. Plaintiff made known her desire for an appointment with tenure, and defendant Leevy indicated that such an appointment would be against the policy of the institution. Dr. Leevy was incorrect. The official written policy of NJMS at the time

plaintiff was hired was that all appointments to full professorship were to be with tenure. Guidelines, I.B.1. "Professor." Subsequently, on September 3, 1985, the Guidelines were amended to provide that a full professor could be appointed with or without tenure. However, in spite of the Guideline provision in effect at the time of plaintiff's appointment, a provision of which she was unaware, on August 13, 1982 a contract, signed by plaintiff and defendant Lanzoni and specifically incorporating the UMDNJ and NJMS Bylaws, was finalized, which contract provided that plaintiff's appointment was for a three-year term ending June 30, 1985, *i.e.* it was not a tenured appointment. At the time plaintiff was hired, defendant Leevy represented to her, in effect, that she would have no difficulty in attaining tenure.

Tenure at UMDNJ, for a nontenured full professor such as plaintiff, was an automatic perquisite of reappointment. UMDNJ Bylaw Art. V, Tit. D, § 3, ¶3.3; NJMS Bylaw Art. III, Tit. E, § 2, ¶ 2.2. The rules of the University require that a candidate for reappointment serving for a period of longer than two years duration be notified one year before the end of his or her incumbent term if he or she is not to be renewed. UMDNJ Bylaw Art. V, Tit. B, § 3, ¶ c. Thus, the date such notification was due plaintiff would have been June 30, 1984. In anticipation of this deadline, on November 16, 1983 defendant Lanzoni circulated a memorandum to defendant Leevy requiring that the letter inform the former by June 8, 1984 of what action he would recommend with reference to the reappointment of plaintiff. On December 8, 1983, plaintiff forwarded a memorandum to defendant Leevy requesting the commencement of the paperwork necessary to

secure her tenure. By letter dated January 13, 1984, Dr. Leevy notified plaintiff as follows:[1]

> The timing and procedure for granting you tenure have been investigated. Your appointment by the Board of Trustees was June 30, 1982 and, in accordance with the three year probationary period, you will be proposed for receipt of tenure in June of 1985. This will mean that during the Fall of 1984 the tenured faculty should have available the following:
>
> (1) Three letters of recommendation from persons external to the institution.
>
> (2) An updated copy of your curriculum vitae.
>
> (3) A letter from your Firm Chief giving information on your contributions to patient care.
>
> Your accomplishments to date are quite praiseworthy. We must be certain that the FCAP Committee is provided with details of your achievements in education, patient care, research and administration, and I am sure there will be no problem.

On June 25, 1984, a week before the notice of nonrenewal was due, the tenured faculty of the Department met to discuss plaintiff's reappointment. Plaintiff was praised for her productive research program, although minor complaints were raised about her educational activities. There was also concern that plaintiff had not during the preceeding two academic years served as a Teaching Attending Physician at the University Hospital, which appears to have been considered an annual requirement for faculty members. There seems to have been some sentiment that plaintiff should serve as an Attending

---

1. By letter dated February 1, 1984, Dr. Leevy recommended plaintiff for an annual merit increase, using such terms as "highly productive" and "revitalizing."

Physician before a formal recommendation of tenure was made. In any event, the faculty voted, 17 for, none against, to recommend plaintiff for tenure in one year. Defendant Leevy memorialized the outcome of this faculty meeting in a letter addressed to defendant Lanzoni and forwarded to plaintiff. The letter, dated June 25, 1984, stated:

> Based on the recommendation of the tenured faculty (17-0-0), the Department of Medicine *plans to propose* Dr. Margo Cohen for tenure during the next academic year. In a discussion by this group it was felt that Dr. Cohen is fulfilling her education and research responsibilities. Although she has served as a subspecialty consultant and physician, it was noted that Dr. Cohen has not been an Attending as required of all full-time faculty in the Department each year. She is scheduled to serve in this capacity on Firm C during the month of October and this should allow her to fulfill the general medicine patient care responsibilities.
>
> (emphasis added)

According to her affidavit of April 28, 1986, plaintiff believed at the time, and continued to believe for eleven months, that the June 25 letter was obviously not the notice of non-renewal required by UMDNJ Bylaw Art. V, Tit. B, § 3, ¶ c and was thus a notification of renewal indicating that she would be granted tenure. A faculty grievance committee report of March 31, 1986 agreed that plaintiff reasonably expected that the June 25 letter meant that she would, in fact, receive tenure, and that her expectation was reasonable.

Plaintiff served as an Attending Physician during the month of October, 1984, as the June 25 letter noted she would, apparently with less than distinguished reviews,

although plaintiff was not so apprised until May 15, 1985 when she received a copy of a letter of that date from defendant Leevy to defendant Lanzoni. Indeed, as plaintiff states in her affidavit, she received no notification whatsoever that her performance was in any way deficient. Rather, she was instructed by defendant Leevy, by letter dated November 13, 1984, to provide him with an updated curriculum vitae "to process a request to grant you tenure . . . ."

The faculty met on April 4, 1985 and reviewed plaintiff's performance in scathing terms. Plaintiff's research activities, previously highly praised, were cited as "small in number, but good." While I am not in a position to review the latter judgment, plaintiff's curriculum vitae belies the deprecation evident in the former attribution. There were devastating comments with reference to plaintiff's patient care activities, *i.e.* her work in Firm C during October. On April 12, 1985, the faculty met again and voted—twenty-one against, two for, one abstention—not to recommend plaintiff for tenure. The basis for this decision, as defendant Leevy advised defendant Lanzoni by letter dated June 25, 1985, was plaintiff's "failure to fulfill minimum standards for tenure as Professor of Internal Medicine, particularly in the areas of education and patient care." The faculty subsequently voted, seventeen for, none against, to recommend plaintiff for a one year terminal appointment as a Clinical Professor of Medicine upon expiration of her three-year probationary appointment on June 30, 1985. Plaintiff was not informed of this decision of the faculty until she received the letter of May 15, 1985.

Plaintiff strongly objected to the actions taken by the faculty on the tenure recommendation and to the manner in which the matter was handled. A May 31, 1985 memorandum from defendant Lanzoni to Richard C. Reynolds, Senior Vice-President for Academic Affairs of UMDNJ, indicates plaintiff's disagreement with the tenure decision and her refusal to waive her rights. On June 7, 1985, plaintiff filed a grievance requesting as relief acknowledgment and confirmation of tenure. On June 14, 1985, defendant Lanzoni forwarded a letter agreement to plaintiff indicating the terms of her one-year terminal appointment, an agreement which, it seems, plaintiff never signed. Nevertheless, plaintiff has been working from July 1, 1985 to date, apparently under the terms of the unsigned agreement. On March 31, 1986, the faculty grievance committee issued its report which agreed in large part with plaintiff's view of the circumstances surrounding her reappointment. However, plaintiff indicates in her affidavit that UMDNJ has taken no further action with respect to this report. Plaintiff's employment with UMDNJ ends on June 30, 1986 and she has yet to find a full-time position.

* * *

Defendants seek partial summary judgment as to the federal counts on several grounds. First, defendants contend that plaintiff has failed to plead a class-based discriminatory animus sufficiently to meet the requirements of 42 U.S.C. §§ 1985 & 1986. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*,

* * *

Third, the individual defendants contend they are entitled to qualified immunity under the doctrines of *Wood v. Strickland*, 420 U.S. 308 (1975) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). For reasons more fully discussed below, defendants knew or should have known of the possible import of certain provisions of the Bylaws of UMDNJ upon which plaintiff rests a good part of her case, and therefore are not entitled to qualified immunity. *Skevofilax v. Quigley*, 586 F.Supp. 532, 535-42 (D.N.J. 1984). Moreover, there are allegations which, if proved, would indicate that several of the defendants knowingly infringed plaintiff's constitutional rights.

Finally, defendants contend that they are immune from suit under the doctrine of state sovereign immunity as embodied in the Eleventh Amendment. It is well settled that the compass of "under color of state law" for purposes of 42 U.S.C. § 1983 and "state action" under the Fourteenth Amendment [which are essentially equivalent—*Adickes v. S.H. Kress & Co.*, 398 U.S. 144(1970); *Arment v. Commonwealth National Bank*, 505 F.Supp. 911 (E.D.Pa. 1981)] is considerably wider than "state sovereign immunity" under the Eleventh Amendment. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913); *American Civil Liberties Union v. Finch*, 638 F.2d 1336 (1981). Defendants, I note, do not contest that their actions fall inside the scope of 42 U.S.C. § 1983.

The leading test in the Third Circuit for Eleventh Amendment sovereign immunity was espoused in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert.*

denied 397 U.S. 948 (1970), and applied by the Court of Appeals more recently in *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied* 447 U.S. 921 (1980). The ultimate question is "whether an agency, commission or board which is related to the state should be regarded as the sovereign *alter ego* . . ." There are nine factors to be weighed in reaching this decision: (1) local law and decisions; (2) whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury (considered, "perhaps the most important" factor); (3) whether the entity has the funds or the power to satisfy the judgment; (4) whether this is a proprietary or a governmental function; (5) whether the entity has been separately incorporated; (6) the entity's degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether the entity's property is immune from state taxation, and (9) whether the sovereign has immunized itself from responsibility for the entity's operations.

The Eleventh Amendment immunity of defendant UMDNJ has been twice considered recently by judges of this court, *Gona v. College of Medicine & Dentistry*, Civ. No. 83-3832 (D.N.J. February 15, 1985) (order of Debevoise, J.), *Mauriello v. University of Medicine & Dentistry*, Civ. No. 83-1569 slip opinion (D.N.J. August 10, 1984) (opinion of Lacey, J.), *rev'd on other grounds* 781 F.2d 46 (3d Cir. 1986). In *Gona*, according to defendants, Judge Debevoise denied UMDNJ's motion for summary judgment after considering the Eleventh Amendment status of defendant UMDNJ. In *Mauriello*, Judge Lacey, after a full trial, decided that UMDNJ was not an *alter ego* of the state.

As Judge Lacey was deciding numerous post-trial motions on that date, his reasoning as to his decision is not expounded at great length. However, at pp. 43-44 of the transcript, apparently relying upon the representation at p. 21 of the transcript that UMDNJ received only 42% of its total operating budget from the state, Judge Lacey makes it clear that he relied upon the factor considered the most important by *Blake v. Kline, supra:* whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury. Judy Lacey stated:

> While the case is a close one, the court cannot avoid the clear consequence of a certain portion of the deposition of one Piccolo. His testimony indicates that it cannot be said with any certainty that any judgment in this case will be paid by the state rather than the university. The court has reviewed all of the cases cited by both sides, has tested the facts here against the various measuring rods of those cases, and ultimately concludes that the suit for damages against the university is not barred by the 11th Amendment.

Subsequent to that decision, it appears that the state's contribution to the UMDNJ budget has been reduced to 39%. Defendants' Reply Brief at p. 14. I might well rest my decision on this point upon grounds of offensive collateral estoppel. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). However, given the somewhat cursory nature of Judge Lacey's opinion as relevant here, I go somewhat further.

As to the first of the nine factors invoked by *Blake v. Kline, supra,* state law and decisions, there is very little. Defendants urge that, as UMDNJ's predecessor, the College of Medicine and Dentistry of New Jersey (hereinafter CMDNJ), was denominated by Supreme

Court of New Jersey "a state institution" in *English v. College of Medicine and Dentistry*, 73 N.J. 20, 22 (1977). This means no more, however, than that UMDNJ is a state university, which has nothing to do with Eleventh Amendment immunity. In addition, plaintiff aptly points out that *English v. College of Medicine and Dentistry* was decided before the 1981 amendments to the statute, which, aside from granting the school considerably greater powers, changed its name and status from college to university.

A more recent decision of the New Jersey courts is directly on point. In *Fuchilla v. Layman*, No. A-3827-84TI, slip opinion (N.J.App.Div. May 27, 1986), the Appellate Division found that UMDNJ was autonomous and definitely not an *alter ego* of the state. Judge Dreier rested his opinion upon the statute organizing UMDNJ, N.J.S. 18A:64G-1 *et seq.*, the "Medical and Dental Education Act of 1970" as amended, discussed below, and upon *DeAngelis v. Addonizio*, 103 N.J.Super. 238, 249-54 (LawDiv. 1968), cited with approval for this proposition in *Atlantic Community College v. Civil Service Commission*, 59 N.J. 102, 111 (1971). The *DeAngelis* decision dealt with the New Jersey College of Medicine and Dentistry (hereinafter "NJCMD"), one of the two predecessor institutions to CMDNJ, the other being the Rutgers Medical School (hereinafter "RMS"). The court in *DeAngelis* found NJCMD to be an independent and autonomous entity. Defendants represent that the extremely recent *Fuchilla* decision may well be appealed.

The second and third, and perhaps the most important, factors of *Blake v. Kline, supra*—whether the judg-

ment will have to be paid out of the state treasury and whether the entity has the funds or power to satisfy the judgment—were, as noted earlier, discussed in Judge Lacey's opinion in *Mauriello*. Moreover, UMDNJ receives, in addition to its appropriation from the state, "tuition, fees, [and moneys from] auxiliary services and other services," amounting, as stated above, to some 61% of the university budget, which the UMDNJ Board of Trustees has "the power and *duty*" to "[d]isburse" N.J.S. 18A: 64G-6 generally & (e). (emphasis added) Since 1981, the UMDNJ Board has had the ability to "fix and determine, *after consultation with* the Board of Higher Education, tuition rates, and other fees to be paid by students." N.J.S. 18A:64G-6(j). Before that time, the UMDNJ Board had to seek the *approval* of the Board of Higher Education over this important independent source of income.

In addition, since its foundation, the CMDNJ Board has had the power to "[a]cquire (by gift, purchase, condemnation or otherwise), own, lease, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for college purposes." N.J.S. 18A:64G-6(n). Since 1981, under this title, the UMDNJ Board has been given power to dispose of such property, a right previously granted by N.J.S. 18A:64G-6(o). Finally, and perhaps most importantly, since 1981, the UMDNJ Board has had the right to "[b]orrow money for the needs of the university, as deemed requisite by the board, in such amounts and for such time and upon such terms *as may be determined by the board*, provided that *no such borrowing shall be deemed or con-*

strued to constitute a debt, liability, or a loan or pledge or credit, or be payable out of property or funds, other than moneys appropriated for that purpose of the State . . . " N.J.S. 18A:64G-6(o). (emphasis added) *See* N.J.S. 18A:64G-15.

Thus, it appears clear that UMDNJ can satisfy any judgment against it with funds from private sources. Indeed, defendants admit in their reply brief at p. 10 that any judgment would be paid at most only indirectly from state funds. Where there are substantial non-state funds which are otherwise available or are commingled with appropriations from the state, as in this case, mere commingling will not perfect the defense of sovereign immunity. *Blake v. Kline, supra* at 724. If after a judgment against U.N.J.M.D. the state decides to increase its funding of the school, contrary to defendants' assertion in their reply brief at pp. 7-8, 14-15, the effect on the state Treasury is merely ancillary, and therefore not barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *Blake v. Kline, supra* at 726.

As to the fourth *Blake v. Kline* factor, there is some question as to whether maintenance of a university is a proprietary, *i.e., jures gestionis*, rather than a sovereign or governmental, *i.e. jure imperii*, function. There are varying definitions of the distinction between proprietary and governmental functions. *See generally* Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis in terms of jurisdiction to prescribe," 26 Harv. Int'l L.J. 1 (1985). *See also* I. Brownlie, Principles of Public International Law, 330-32 (1979). Some, to oversimplify, classi-

fy as "proprietary" such activities as are normally done by private entities. *See Board of Trustees v. J.P. Fyfe, Inc.*, 188 N.J.Super. 288 (L.Div. 1982), *aff'd on same point* 192 N.J.Super. 433 (App.Div. 1983), *certif. denied* 96 N.J. 308 (1984). See *Handsome v. Rutgers*, 445 F.Supp. 1362, 1367 n. 7 (D.N.J. 1978). By this criterion, UMDNJ would partake of a proprietary nature. On the other hand, some hold, again oversimplifying, that acts of a commercial and profit-seeking (if not profit-making) nature are proprietary, while those that are intended for the public welfare and essentially eleemosynary (even if usually done by private entities) are governmental. *See Hall v. Medical College*, 742 F.2d 299 (6th Cir. 1984); *Miller v. Rutgers*, 619 F.Supp. 1386 (D.N.J. 1985). On this basis, UMDNJ would be governmental.

As to the fifth, sixth, and seventh *Blake v. Kline* factors: UMDNJ is separately incorporated as a body corporate and politic by virtue of the 1981 amendments to the Medical and Dental Education Act. N.J.S. 18A:64G-3. The same amendments guarantee the autonomy of UMDNJ, stating, "It is declared to be the public policy of the State that the university shall be given *a high degree of self-government* and that the government and conduct of the university shall be free of partisanship." (emphasis added) N.J.S. 18A:64G-3.1. "Autonomy," is, of course, derived from the Greek *autos* "self" and *nomos* "law," and means, "the quality or state of being self-governing." Webster's Ninth New Collegiate Dictionary 117-18 (1965). *DeAngelis v. Addonizio, supra*, as discussed above, found

UMDNJ autonomous.[2] UMDNJ has the right to sue and be sued,[3] N.J.S. 18A:64G-3.4 (1981), and to contract, N.J.S. 18A:64G-6(l).

While there is no specific provision as to taxation in the Medical and Dental Education Act, UMDNJ is exempt from taxation as are all nonprofit colleges and hospitals

---

2. While UMDNJ still has numerous ties with the state, such as the fact that all the members of the Board of Trustees are appointed by the Governor (N.J.S. 18A:64G-4), the basic policy is thus one encouraging autonomy.

3. Defendants claim, at p. 26 n. ** of their moving brief and at pp. 18-19 of their reply brief, that UMDNJ does not have the right to sue or be sued. However, Judge Debevoise, in a recent opinion for publication, stated that UMDNJ does have that right. *Kovats v. Rutgers,* Civ. No. 82-2000 slip opinion at 13 & n. 7 (D.N.J. April 24, 1986). Confusion appears to arise out of the lack of specific wording guaranteeing the right of suit to CMDNJ and UMDNJ. The one opinion that examines this question at length has stated that CMDNJ had no right of suit. *Frank Briscoe Co. v. Rutgers,* 130 N.J.Super. 493 (L.Div. 1974). While I adopt the great majority of the reasoning of *Frank Briscoe Co. v. Rutgers,* I believe that subsequent history indicates that the case was wrongly decided on the minor issue of the right to suit of CMDNJ. *Frank Briscoe Co. v. Rutgers* was decided as it was because of the lack of explicit statutory language on the right to suit, whereas the statutes organizing NJCMD specifically allowed for such right [N.J.S. 18A:64C-8(b)(passed 1964, repealed 1970)] and the 1970 statute only preserved the right to sue and be sued for cases then pending against NJCMD N.J.S. 18A:64G-26. *Frank Briscoe Co. v. Rutgers* held that, as no specific provision for the right to suit was enacted, and only certain ongoing suits were preserved (i.e. only those by or against NJCMD, but not those of RMS), it could be inferred that no right to sue or be sued existed.

In light of the passage in 1981 of N.J.S. 18A:64G-3.4, which guarantees the preservation in the name of UMDNJ of suits then pending by or against CMDNJ, and the retention at the same time of N.J.S. 18A:64G-26. N.J.S. 18A:64G-3.4 it is fair to suggest that the legislature believed that CMDNJ had the

(Continued on following page)

in New Jersey. N.J.S. 54:4-3.6. Finally, the state has immunized itself from responsibility for UMDNJ's operations. "No provision in this act contained shall be deemed or construed to create or constitute a debt, liability, or a loan or a pledge of the credit of the State of New Jersey." N.J.S. 18A:64G-15. *See* N.J.S. 18A:64G-6(o).

(Continued from previous page)

right to suit, or otherwise there would have been no need for the additional provision. The retention of N.J.S. 18A:64G-26 would have taken care of any suits still pending from the time of NJCMD if CMDNJ had never had an independent right to suit. Institutions that previously had the right to suit retain that right by implication unless expressly abrogated. *Frank Briscoe Co. v. Rutgers, supra* (in reference to Rutgers). In light of the 1981 amendments, therefore, I read N.J.S. 18A:64G-26 as continuing by implication the right of suit of NJCMD in CMDNJ not only for suits then pending as to NJCMD, but also as a corporate right. Thus, for these purposes, CMDNJ was not a "new" college, but a continuation of a preexisting one, the point *Frank Briscoe Co. v. Rutgers, supra* decided incorrectly. As *Frank Briscoe Co. v. Rutgers, supra* correctly decided, however, a provision for preservation of actions was not inserted for RMS, because, as a component part of Rutgers University, it had no independent right to suit and all suits pending against it at the time of its absorption by CMDNJ were retained by Rutgers University under its rights as the continuing corporation. This would be the reason for the complex statutory provisions (N.J.S. 18A:64G-29 & 30) and private agreement (referred to in *Frank Briscoe Co. v. Rutgers, supra)* to transfer all the assets and interest, state and private respectively, of RMS to CMDNJ.

This reading is further supported by the fact that the UMDNJ Board was guaranteed "such powers, rights and privileges that are incident to the proper government, conduct and management of the college [amended in 1981 to read "university"] . . . and such powers granted . . . *or reasonably implied* may be exercised. . . ." (emphasis added) N.J.S. 18A:64G-7. This provision was further amended in 1981 to allow UMDNJ to retain independent counsel with the approval of the Attorney General, a provision that would be far less useful if UMDNJ did not have the right of suit.

Thus, of the nine factors to be weighed under the test of *Blake v. Kline, supra*, six—the second, third, fifth, sixth, seventh, and ninth—weigh against sovereign immunity in this case. With reference to the other three factors—the first, the fourth, and the eighth—there is a certain ambiguity, but none of those factors preponderates in favor of defendants. In addition, I note that while defendants cite several cases for the proposition that Eleventh Amendment sovereign immunity attaches to state colleges and universities, while acknowledging that each case must be judged on its own facts [*Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975)], the cited cases within the Third Circuit denied state institutions of higher learning sovereign immunity. *Gordenstein v. Unversity of Delaware*, 382 F.Supp. 718 (D.Del. 1974); *Samuel v. Unversity of Pittsburgh*, 375 F.Supp. 1119 (W.D.Pa. 1974), *on subsequent proceedings appeal dismissed* 506 F.2d 355 (3d Cir. 1974), *affirmed in relevant part, reversed in part on other grounds*, 538 F.2d 991 (3d Cir. 1976), *cert. denied* 429 U.S. 979 (1977). Moreover, the only recent case within the Third Circuit to have granted a state college or university sovereign immunity, *Miller v. Rutgers*, 619 F.Supp. 1386 (D.N.J. 1985), was recently disavowed based on new information received by its author, Judge Debevoise. *Kovats v. Rutgers*, slip opinion *supra* at 5. Judge Thompson, as well, has recently decided that Rutgers University could not assert the defense of sovereign immunity. *Varma v. Bloustein*, Civ. No. 84-2332 slip opinion (D.N.J. June 6, 1986) (opinion and order).

I find Judge Debevoise's discussion of *Mauriello* in *Kovats, supra* slip opinion at 14, to be particularly enlightening. In the first place, he infers that the Court of

Appeals for the Third Circuit, by only discussing the merits in its opinion, implicitly affirmed Judge Lacey's finding of no sovereign immunity for UMDNJ which, as a jurisdictional defense, would otherwise normally have been discussed first. *See Edelman v. Jordan*, 415 U.S. *supra* 677. Judge Debevoise changed his opinion in *Miller* for two reasons: certain new information and the treatment of *Mauriello* by the Court of Appeals. *Kovats, supra* slip opinion at 5. In the second place, in finding no sovereign immunity for Rutgers in *Kovats*, Judge Debevoise found the situations of Rutgers and UMDNJ very similar except that in two respects the position of UMDNJ favored sovereign immunity somewhat more than did that of Rutgers: (1) All the members of the UMDNJ Board are appointed by the Governor, whereas Rutgers is primarily governed by a Board of Governers the majority of whom are chosen by the Governor directly and a minority of whom are chosen only in part and indirectly by the Governor according to a complex process. N.J.S. 18A:65-14 & 15. (2) The Director of the New Jersey Division of Investment has control over the investment of the funds of the Board. N.J.S. 18A:64G-8. However, as discussed above, these two matters go to the autonomy of UMDNJ, which is at any rate guaranteed by N.J.S. 19A:64G-3.1.

Moreover, and a fact unbeknownst to Judge Debevoise, only 39% of UMDNJ's funding comes from the state, while 53.2% of Rutgers' budget is provided by the state. In this area of independent funds to pay a judgment, perhaps the most heavily weighted of the factors enunciated in *Blake v. Kline*, the case for denying sovereign immunity to UMDNJ is even stronger than that of Rutgers. Finally, I note that even in cases in which sov-

ereign immunity applies, that doctrine will not act to bar equitable prospective relief, even when that prospective relief will require the payment of money in the form of a salary. *Stebbins v. Weaver,* 396 F.Supp. 104 (W.D.Wis. 1975), *aff'd* 537 F.2d 939 (7th Cir. 1976), *cert. denied* 429 U.S. 1041 (1977). *See Samuel v. University of Pittsburgh,* 56 F.R.D. 435 (W.D.Pa. 1972), *subsequent proceedings* 375 F.Supp. 1119 (W.D.Pa. 1974), *on subsequent proceedings appeal dismissed* 506 F.2d 355 (3d Cir. 1974), *affirmed in relevant part, reversed in part on other grounds* 538 F.2d 991 (3d Cir. 1976), *cert. denied* 429 U.S. 979 (1977).

Finally, New Jersey law provides that academic tenure is of a unique nature in that it is one of the few personal service employment contracts susceptible of specific performance. This is so because of the difficulty in measuring damages when the employment contract is of indefinite duration and because of the importance of the status of tenured professors, "in the milieu of the college teaching profession." *American Ass'n of Univ. Profs. v. Bloomfield College,* 136 N.J.Super. 442 (App.Div. 1975), *aff'g* 129 N.J.Super. 249 (Ch.Div. 1974).

Defendants' motion to dismiss on the ground of sovereign immunity is denied.

* * *